Office - Supreme Court, U.S.
FILED
SEP 17 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-138

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS,

Petitioners,

v.

MANAGEMENT ASSISTANCE, INC., GENESIS ONE COMPUTER CORPORATION, ROBERT W. BEREND, RAYMOND P. KURSHAN AND CHARLES F. TRAYER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

HOWARD D. PATTISON
106 E. Corsicana
Athens, TX 75751
(214) 675-6030

MARTIN R. STOLAR
350 Broadway, Suite 1207
New York, NY 10013
(212) 220-2800

Counsel For Petitioners

OF COUNSEL:

Pattison Law Offices

Stolar, Alterman & Guilelmetti, P.C.

INDEX

Page

OVERVIEW 1

REPLY TO POINT I 3

REPLY TO POINT II 4

REPLY TO POINT III 6

REPLY TO POINT IV 9

REPLY TO POINT V 10

APPENDIX:

[Excerpt from] Deposition of Plaintiff Charles Ben Howell ..... PA 101

Pages 947-949, Joint Appendix, 2d Circuit, being Affidavit of Howard D. Pattison Dated March 5, 1980 ..... PA 105

Pages 950-952, Joint Appendix, 2d Circuit, being parts of Affidavit of Howard D. Pattison Dated March 16, 1980 ..... PA 107

Excerpt from Plaintiffs' Memorandum in Support of Cross-Motion to Defer Summary Judgment Proceedings Pending Discovery ..... PA 108

Pages 962-963, Joint Appendix, 2d Circuit, Being Parts of Affidavit of Howard D. Pattison Dated March 25, 1980 ..... PA 112

Pages 313-314, Joint Appendix, 2d Circuit, Being Portions of Summary Judgment Affidavit of Robert W. Berend, General Counsel, Management Assistance, Inc., Dated Dec. 10, 1979 ..... PA 113

Page

Page 475, Joint Appendix, 2d Circuit, Being Portion of Management Assistance, Inc. Proxy Statement Dated July 9, 1974 and Further Being Exhibit to Defendants' Motion for Summary Judgment ..... PA 116

Pages 316-319, Joint Appendix, 2d Circuit, Being Respectively, Portions of Summary Judgment Affidavits of Robert W. Berend, General Counsel, and Gerald Walpin, Trial Counsel, Management Assistance, Inc., both Dated December 10, 1979 ..... PA 118

Excerpt from District Clerk's Record, Item 52, Being Plaintiffs' Combined Substitute and Supplemental Brief in Opposition to Motion for Summary Judgment ..... PA 122

CITATIONS

Cases: Page

Abramson v. Nytronics, 312 FS 519 (SDNY 70) 5

Adickes v. Kress, 398 U.S. 144 (70) 4

Anders v. CA, 386 U.S. 738 (67) 8

Bertoglio v. Texas Intl., 448 FS 630 (DE 80) 5

Clayton v. Farish, 73 NYS 2d 727 (NYSM 47) 8

Cohen v. Ayers, 449 FS 298 (N.D. IL 78) *aff'd*, 596 F2d 733 (7th Circuit) 5

Diamond v. Oreamuno, 248 N.E.2d 910 (NYAP 69) 8

First Natl. v. Cities, 391 U.S. 253 (68) 4

Fogelson v. American, 170 F.2d 660 (2-NY 48) 4

Galef v. Alexander, 615 F.2d 51 (2d Cir. 80) 8

JI Case v. Borak, 377 U.S. 426 (64) 7

Lessler v. Dominion, 411 FS 40 (SDNY 75) 5

Loews' v. Bays, 209 F.2d 610 (5-MS 54) 4

Mo. Portland Cement v. Porter, 535 F.2d 388 (8th Cir. 76) 5

Parklane v. Shore, 439 U.S. 322 (79) 9, 10

Poller v. CBS, 368 U.S. 464 (62) 9

Pollitz v. Wabash, 207 NY 113, 100 NE 721 (12) 8

Rodman v. Grant, 608 F.2d 64 (2-NY 79) 9, 10

Ronson v. Liquifin, 370 FS 597, *affd.*, 497 F.2d 394 (3rd Cir.) 5

Santa Fe v. Green, 430 U.S. 462 (77) 7

Schenker v. Du Pont, 329 F.2d 77 (2d Cir.) 8

Page

Schoenbaum v. Firstbrook, 405 F.2d 215 (2-NY 68) (en banc) 4, 9

Tobelman v. Pipe Line, 130 F.2d 1016 (3-DE 42) 4

TSC v. Northway, 426 U.S. 438 (76) 9

United Mine Workers v. Gibbs, 383 U.S. 715 (66) 8

Constitutional Provisions, Statutes & Rules

United States Const., Amdt. One 5

17 CFR §240.14a-101, Sch. 14A, Item 13(c) (78 ed. p. 613) 9

Rule 56(e), FRCVP 7

Other

Brudney, *Limits of Preferred Modification*, 26 Rutgers LR 445, 462-463 (73) 10

Brudney, *Going Private*, 61 VALR 1019 (74) 10

Going Private, 28 Emory LJ 111 (79) 10

1 Lipton & S, *Takeovers*, 420-1 (NYLJ Press 78) 10

SEC Going Private Rule, 4 DE J. Corp. L. 184 (78) 10

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS,

Petitioners,

v.

MANAGEMENT ASSISTANCE, INC., GENESIS ONE COMPUTER CORPORATION, ROBERT W. BEREND, RAYMOND P. KURSHAN AND CHARLES F. TRAYES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

OVERVIEW[1]

As pointed out by respondents, the decision of the District Court (PA 4) has been published at 519 FS 83. The

---

[1]Petitioners will continue the abbreviated references explained in footnote 1, page 1 of the petition. Additional abbreviations: (Ptn. ___) — Petition for Certiorari filed herein; (Br.Op.___) — Respondents' Brief in Opposition filed herein. Petitioners' Appendix attached hereto will be abbreviated as previously (PA___), but pagination will arbitrarily commence with (PA 101).

Unless otherwise indicated, all emphasis has been supplied.

publication was overlooked because it did not appear in the advance sheets until the addition of approximately October 6, 1981.

The strident tone of respondents' brief in opposition suggests that the case was incorrectly decided. Petitioners submit that it is respondents who are presenting unsupported claims. A principal objective of this reply is to present a supplemental appendix establishing that respondents' contentions are unsupported.

Respondents argue that the redemption was "overwhelmingly" approved, but such proposition is immaterial to an action such as this grounded upon "corporate therapeutics." Indeed, prosecution of this action has been "overwhelmingly" approved by 94.01% of the C shareholders, only 87 exclusion requests being received when class notices were mailed (241, 50A).[2]

---

[2]Respondents' denials of tape recordings are late in coming, so late that they cannot be tested without remand. Judge Howell, at his deposition demanded to know if his conversations had been recorded but respondents' counsel expressly refused to inform him (PA 102). When petitioners filed a notice to produce asking for tape recordings (965A, item 68) respondents refused production on grounds of vagueness and "work product" (989A). Meanwhile, our statement that the proposal for a "private" settlement emanated from respondents, not petitioners, stands unchallenged (Ptn.n.3, PA 61n.9).

It does not offend the Constitution for law enforcement officials detecting crime with consent of one party to record conversations. However, bar groups nationwide have declared such activities by private attorneys in civil litigation unethical.

Respondents' own exhibit states that in January, 1974, Walter Oreamuno and his wife were forced to resign as directors of MAI, that his long term employment contract and options were canceled and that suit against him was pending, "as a result of * * * (his) conduct in connection with the Mexican printing plant subsidiary * * *" (417A). We have no further information and deny any intent to imply that respondent Kurshan had any involvement in that matter. Petitioners reiterate that in the past, MAI executives have not always exhibited high standards of corporate accountability.

REPLY TO POINT I

Respondents have lumped their answer to questions 1 and 2 into their Point II. By Point I, they renew the argument, heavily relied upon in the courts below, that the entire action of the petitioning class should be forfeit. Such argument is repeated throughout their brief.

The fate of the class has been sealed because, in their view, petitioners failed to obtain or demonstrate the necessity for discovery (Br.Op. 4).

Formation of the class was approved on November 28, 1979 (R. 44, endsmt, 3A). Within three months, on February 25, 1980, by refusing to grant additional briefing time, the Court directly indicated that the MSJ was under final submission and no further opposition would be permitted (Ptn.n.8). Petitioners could not know that the MSJ would remain under submission more than the customary 30 days or so and should not be faulted for failing to attempt discovery of what would not be considered. Additionally, respondents refused discovery on grounds that such was unnecessary "to oppose said motion" (Ptn.n.8) and the Court stated "Mr. Pattison, * * * if I feel that I need something further from you, I will let you know" (PA 32). Under these circumstances, visiting the entire class with forfeiture was unwarranted.[5]

---

[5]We think Judge Howell's 410 page deposition has been selectively cited and mischaracterized on the whole, but what difference? Assume the deposition had disclosed that the named plaintiff had a third grade education, a twelve year old mentality and knew nothing about his holdings. Would the deposition entitle respondents to an MSJ by default, especially against the entire class? The question in this and every securities case is the conduct of the defendant. The conduct of the named plaintiff is not in issue.

Neither are summary judgments granted by default. *Adickes v. Kress*, 398 U.S. 144 (70) makes it clear that a controverting affidavit is not a *sine quae non*, that the burden is upon the moving party, and that movant must controvert all material allegations against him. Distinguishing *First Natl. v. Cities*, the Court stated the burden does not shift until movant *"conclusively"* shows the respondents' allegations are without foundation. Such was never done below as demonstrated in the petition and in the Trial Court briefs of 141 pages (R. 52) and 22 pages (R. 59).

The unarticulated contention that it is impermissible to oppose summary judgment by pointing out deficiencies in the movant's proof is untenable.

Respondents have attacked petitioners' affidavits for opportunity to conduct discovery (Br.Op. 7) and they are attached hereto so that the Court may evaluate them (PA 105-113). It has been numerously held that prior to summary judgment, sufficient time for discovery is especially important when relevant facts are within the exclusive control of the movant. *Loews's v. Bays*, 209 F.2d 610, 615 (5-MS 54). The rule has been held specifically applicable to shareholder litigation. *Tobelman v. Pipe Line*, 130 F.2d 1016, 1022 (3-DE 42); *Fogelson v. American*, 170 F.2d 660 (2-NY 48); *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2-NY 68) (en banc).

REPLY TO POINT II

Having strongly urged the proxy supplement in the Trial Court, respondents would now dismiss it as "superfluous" (Br.Op. 4), but the Second Circuit has ruled otherwise and both courts relied heavily thereon (Ptn. 11-12).

Respondents are not supported by their authorities. In *Porter*, a tender offer case, following notice and hearing, the Court approved an amended solicitation and lifted a preliminary injunction (*l.c.* 391). Essentially speaking, petitioners urge the same procedure. *Bertoglio* rejected a clean hands argument finding a "public interest * * * above the interests of the parties themselves" and ordered a complete re-solicitation of proxies (*l.c.* 662-3, 4). Likewise, *Cohen* reflects a complete re-solicitation of proxies (*l.c.* 449 FS 306, 316). The failure to "pre-clear" the re-solicitation, if such was the fact, was not raised. However, the Seventh Circuit expressly declined to consider the validity of the re-solicitation (*l.c.* 596 F.2d 737). Nor was re-solicitation addressed in *Lessler* and such would have been futile, the acquiror holding 95% interest. In *Ronson*, whether the court required re-solicitation is unclear, but judicial preclearance was apparently observed (*l.c.* 370 FS 600). In *Abramson* (See Ptn.n. 10), the preliminary injunction hearing was "held in abeyance" meaning that judicial consent was obtained (*l.c.* 523). It was not until after the supplement had been circulated with judicial consent that plaintiff urged judicial preclearance and re-solicitation; obviously, too late.

It is completely incongruous in a securities case to require studied preclearance of the class notice (See 207, 11, 20, 8, 37, 8 & 41 A) and of any notice of proposed settlement, but to leave management, the only party with power to do so, free to build its defenses unilaterally. A rule holding that communications not precleared may not be considered equalizes an unequal situation without First Amendment implications. None of respondents' cases goes nearly as far as the present facts where a midnight supplement was rushed out for the purpose of creating a defense to a pend-

ing case, after the filing thereof, without consent of court or notice to opposing counsel, and without the re-solicitation of proxies; thus allowing respondents to retain the benefit of their unlawful solicitation. Such action should not stand.[4]

REPLY TO POINT III

Respondents have not answered the proposition that there was a 1978 securities violation (PA 23-24) and the same should be sustained. Neither have they questioned our calculations showing that a minimum of $5.98 million has been diverted, now amounting to $7.37 per C share.

While it is contended that "the information sought" was "fully disclosed" (Br.Op. 5, 9), respondents point to nothing in the original and point only to unaudited financial statements in the supplement (PA 53-4).[5]

---

[4]The original solicitation is argued as "complete and accurate" (Br. Op.n. 5), but the courts below relied heavily upon the supplement mandating as minimal relief, a remand for reconsideration. $40 of the $50 face amount of the C shares was payable solely from GOCC cash flow, but no GOCC financials were provided in the first round. Would a C shareholder consider them important particularly when, as now admitted, they would have shown that MAI had failed ever since 1974 to provide any return to GOCC upon the bulk of GOCC's assets? Obviously!

[5]The supplement goes no further than showing $16.8 million "Due from affiliated companies" at September 30, 1977. The operating summary (PA 53) is a condensed statement reflecting substantial "miscellaneous" revenue and reflecting interest expense and "parent company charges" both as being "net" items of expense. The term "net" means that interest income and parent payments have been offset against interest and parent expense leaving a "net" expense in the amount shown. The fact that the $16.8 million was non-income producing simply cannot be verified. After calculating what the $16.8 million should be producing, a trained analyst might surmise that, if the $16.8 million had been outstanding for the entire period, the miscellaneous interest and parent company items do not seemingly reconcile with the notion that a fair return is being allowed, but there is nothing on these two pages from which the matter can be clarified. Our suspicions were not confirmed until the filing of respondents' brief on appeal (Ptn. 22, 23).

Respondents contend they "affirmatively demonstrated * * * no impropriety" in 1974, but the reference to the affidavit of their general counsel, respondent Berend (PA 113) establishes nothing.[6] The full text of the 1974 prospectus (366-461A) and of the 1974 proxy (469-542A) were attached to their MSJ, but they have pointed to nothing whatever in the prospectus and find (Br.Op.n. 6) only one innocuous phrase in the proxy (PA 116). Was this a sufficient disclosure that the bulk of the assets of the subsidiary had been farmed out to "affiliated companies" with no arrangements for reimbursement or negotiation to secure compensation for the use thereof? We think not.[7]

Santa Fe and like citations (Br.Op. 10) have no relation to pendent claims. The matters recited (Ptn. 22-26) demonstrate that viewing the record in the light most favorable to petitioners, respondents did not "conclusively" establish that petitioners have no state law action to be compensated for use of the $17 million.[8]

---

[6]It is further well established that SEC clearance is no defense to a shareholder action such as this. **J. I. Case v. Borak**, 377 U.S. 426, 432 (64).

[7]The remaining reference in footnote 6 are to a portion of a Trial Court brief (1049-1053A) filed November 26, 1980, (Item 63, 4A) and attachments thereto. Apparently, the attachments are extracts from reports to shareholders duing 1976 (1075A) and 1975 (1087A) plus extracts from SEC filings around January 1, 1975 (1084A), during January, 1977 (1090A) and November, 1976 (1093A). Such method of presenting summary judgment proof is improper. Further, the Trial Court had ordered petitioners not to respond (PA 32). Substantively, the referred to items, all being circulated after the 1974 flotation of C shares, could not have affected the validity of the prospectus and proxy solicitation had they spelled out the facts in bold black letters (which they fail to do).

[8]It is contended (Br.Op.n. 7) that the affidavits for summary judgment "affirmatively demonstrated" no waste or diversion of assets. Such affidavits (PA 118) are by counsel, are conclusory in nature, do not demonstrate the competency of the affiants to testify, and are incompetent. R. 56(e) FRCVP.

Respondents argue the "pendent claim was baseless" (Br.Op. 5) presenting unsupportive "bad faith" citations (Br.Op. 10).[9] No such authorities or argument were ever mentioned below, thus requiring remand. Never did they present by affidavit or otherwise that they had ever specifically considered the necessity of returning assets to GOCC or paying compensation thereon, and had expressly decided that such was unnecessary. Instead, they argued below that "waste and mismanagement * * * is not part of this action" (PA 24), thereby causing the failure of the Trial Court to fully develop pendent claims. Nothing in the record suggests the courts below found an exercise of reasonable business judgment carried out in good faith and such a holding by summary judgment where nothing at all was paid is unsupportable.[10]

Petitioners ask the Supreme Court to extend the rule of comity set forth in *Gibbs* to provide that where all federal issues are disposed on summary judgment, any pendent claims must be dismissed without prejudice unless the district court affirmatively holds that the pendent issues were fully developed and there is no hope of success thereon before the state court. Compare: *Anders v. CA*, 386

---

[9]Respondents' authorities are not supportive. In **Galef**, summary judgment was reversed for trial on the merits. Neither **Schenker** nor **Pollitz** was a summary judgment case. We further present in connection with question 4 that state of mind issues (intent — if such proof was required to make out a 1974 violation, see Br.Op. 9; or "good faith"; or bad faith) can rarely be decided on summary judgment.

[10]Under New York law, an officer or director may not be held to pay damages out of his pocket unless he acted corruptly or in bad faith or was grossly negligent. **Clayton v. Farish**, 73 NYS 2d 727 (NYSM 47). However, petitioners present a claim for unjust enrichment asking that GOCC receive such compensation from its parent and affiliates that respondents were equitably obliged to provide in the exercise of their fiduciary duties in the first instance. In such instance, a lesser standard applies. **Diamond v. Oreamuno**, 248 N.E. 2d 910 (NYAP 69).

U.S. 738 (67). Such reasonable balancing of federal-state interests mandates reversal.

REPLY TO POINT IV

Of course, it was "obvious" that the C shares would not participate "in MAI's future business activities," (Br. Op.n. 10), but the distinction is a non-distinction. It was obvious to the outside shareholders in *Parklane* that their ownership interest would be terminated and also obvious to the outside shareholders in *Rodman* that cash in the corporate till, in which they held an equity, would be distributed in termination of insider shareholdings. The SEC rules require a statement of purpose. 17 CFR §240.14a-101, Sch. 14A, Item 13(c) (78 ed. p. 613). That which should be classed as purpose and subject to disclosure can rarely be distinguished on summary judgment from collateral purpose or incidental motivation, not subject to disclosure.

The following statement pertaining to anti-trust cases pertains equally to securities litigation:

> "Summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. * * * Trial by affidavit is no substitute for trial by jury" *Poller v. CBS*, 368 U.S. 464 (62).

In *Schoenbaum v. Firstbrook*, supra, 218, it was stated that summary judgment should rarely be granted in a stockholder action and that issues as to knowledge, intent and motive will ordinarily require a full trial. See also *TSC v. Northway*, 426 U.S. 438 (76) holding summary judgment inapplicable to securities actions unless the facts are such

that reasonable minds cannot differ. Respondents' authority (*Ness*, Br.Op. 6) is in agreement.[11]

REPLY TO POINT V

The $6,000.00 award was obviously penal; for imposing upon the court an allegedly "frivolous" motion. The motion was not frivolous nor has any intent to harass or other improper motive been found or shown. The penalty was improper.

However, the real thrust of question five is overkill. $6,000.00 is still important money to most people, but it is nothing compared to the $5.98 million and more assessed against the class (Ptn. 23). Just as respondents have resolutely ignored the class by speaking in the singular, they have also avoided recognizing the real penalty, being imposed upon 2,000 wholly innocent class members.

Respectfully submitted,

HOWARD D. PATTISON
MARTIN R. STOLAR

Counsel for Petitioners

---

[11] "Freeze-out" situations have been characterized as "internal mergers." The hallmark of the freeze-out is that those in control and having superior knowledge manipulate the corporate structure to their advantage. Knowing that assets are undervalued and business prospects bright, they force the minority to liquidate below intrinsic value; the **Parklane** situation. Conversely, if prospects are dimming, the insiders distribute the cash and other merchantable assets to themselves and "bail-out"; the **Rodman** situation as alleged.

Preferred shareholders are particularly vulnerable to such maneuvers are frequently targets thereof. For such reason, the purpose of freezeouts must be carefully examined. Brudney, **Limits of Preferred Modification**, 26 Rutgers LR 445, 462-463 (73), Brudney, **Going Private**, 61 VALR 1019 (74), **SEC Going Private Rule**, 4 DE J. Corp. L. 184 (78), **Going Private**, 28 Emory LJ 111 (79), 1 Lipton & S, **Takeovers**, 420-1 (NYLJ Press 78).

NO. 82-138

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

CHARLES BEN HOWELL, SUING OF BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS,

Petitioners,

v.

MANAGEMENT ASSISTANCE, INC., GENESIS ONE COMPUTER CORPORATION, ROBERT W. BEREND, RAYMOND P. KURSHAN AND CHARLES F. TRAYES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL APPENDIX

[EXCERPT FROM] DEPOSITION OF PLAINTIFF CHARLES BEN HOWELL

[Same district court, case name and number as before; taken October 17, 1978]

"Q. [BY MR. WALPIN] * * * Did you prior to the commencement of the lawsuit make an offer or authorize

anyone on your behalf to make an offer to settle — to refrain from filing this lawsuit if MAI would settle with you individually? * * * I think you know my question. Are you refusing to answer it? A. The answer is a categorical no. * * *

"Q. Did you at any time up through the present day offer to settle the case by withdrawing the complaint, in return for attorneys' fees? A. And I will ask you, sir, if you made any type of tape recording, electronic recording or other type of verbatim recording of our conversations. If so, I demand that they be produced so that I can refresh my memory.

"Q. Mr. Howell, I am asking you for your testimony. A. I am presuming that you are declining to respond to my request for this disclosure of what type of recording you have made of our conversations, if any.

"Q. Mr. Howell, you are correct, I am declining to respond to that. A. Well, I will proceed to give you my recollections, and I think they are accurate. On a Saturday morning immediately after you received the draft complaint, whatever exhibit number it was, that you made two long distance telephone calls to my office, you initiated them both. And in the first conversation you proposed to me that the company was willing to — you didn't discuss any figures, I don't believe, but you stated that the company was willing to make a settlement proposal if I would omit my prayer for injunctive relief, a settlement proposal to me personally. And then you immediately thereafter, in the next five or ten minutes, initiated another telephone call stating that the company would also require that I omit my class action allegation from my pleading in order for the company to make me a personal settlement proposal.

"MR. WALPIN: I am going to have to look for something for a moment, if we may have a moments recess. (Brief recess). [Petitioners' note: At this time, counsel left the room and returned with a file containing a transcript or memorandum of some sort. He proceeded to examine the witness while referring thereto.] BY MR. WALPIN: Q. Mr. Howell, do you recall what date was this that you say this occurred, this conversation? A. I would have to have a calendar to pin it down but I recall that it was a Saturday.

* * *

"Q. Would July 29th, a Saturday, be correct? A. I suspect that's correct, yes, sir.

* * *

"Q. Do you recall that on Friday, July 28th, I telephoned you to tell you I was authorized to accept service on behalf of the proposed defendants? A. You did give me that message, impart that message somewhere along the line. Whether the date is correct I am not sure, but that sounds about right.

* * *

"Q. And do you recall I also told you that as a litigating attorney, I recognized, however, that every lawsuit, even one totally without merit, has a nuisance value for settlement purposes, in view of the litigation expenses involved? A. Those words — I don't recall the words as being phrased exactly like that, but I do recall you stating that, that it was worth something to the company to be — to avoid a lawsuit like this.

* * *

"Q. Do you recall my stating to you the requirement that MAI could not even consider a nuisance value settlement at that time? A. I don't believe you put it in those words, no, sir; that is not my recollection. If you are reading from a tape recorded transcript, I would like to see it, or another verbatim transcript, I would like to see it at this time.

"Q. And was there any explanation by anyone as to what the requesting of an injunction or not requesting of an injunction would have to do with any settlement? A. Your statement to me in the first conversation was that if the prayer for injunctive relief was omitted, then you could be willing to recommend a settlement to the company after the shareholders meeting; but before the shareholders meeting, that your hands were tied, I believe you used that phrase, because in your opinion the Securities Act would require you to disclose any settlement made if it was effected prior to the date of the shareholders meeting. And I believe you used the phrase 'we'll be free from that restriction once the shareholders meeting has gone by, and I would suggest to you that the best way to settle this thing, Mr. Howell, would be to omit the prayer for injunctive relief, the prayer for temporary restraining order,' I believe. That is my best recollection of the conversation.

* * *

"Q. Now, isn't it a fact I told you that I could not at that point make any agreement or give you any commitment or give you anything to rely on that even nuisance value settlement could be agreed to after — A. You had some disclaimers in there, the company hadn't authorized you to offer anything, but you felt that they would probably

go along with a reasonable recommendation from you, or something like that; the standard lawyer language."

[907-17A]

[PAGES 947-949, JOINT APPENDIX, 2d CIRCUIT, BEING AFFIDAVIT OF HOWARD D. PATTISON DATED MARCH 5, 1980]

[Same district court, case name and numbering as before]

* * *

On approximately December 12, 1979, defendants filed their motion for summary judgment in this case. The total length of the motion, affidavits, brief and other documentation filed by defendants was 394 pages. Defendants demanded that plaintiffs respond thereto on December 26, 1979. Plaintiffs asked additional time to respond to this motion and pursuant to request, the Court has granted extensions of time to plaintiffs to and through February 25, 1980.

3. On February 24, 1980, plaintiffs transmitted to the Court by express mail a brief in opposition covering several of the issues raised in this case plus a request for additional time to fully respond to the defendants' motion for summary judgment.

4. On February 27, 1980, the undersigned attorney was notified by telephone call from court personnel to the undersigned attorney's office that the request for additional time to respond to the motion for summary judgment had been denied.

5. Plaintiffs tender herewith their completed brief. Plaintiffs request that the Court reconsider its ruling dated

February 27, 1980, that the time to respond to defendants' motion be extended to and through the date of filing of the within motion, and that the brief tendered herewith be held and considered to be timely filed.

6. Counsel would show that counsel has acted in this matter as diligently as possible. The undersigned attorney is a solo general practitioner and since the service of defendants' motion, this attorney has been required to make numerous appearances in many courts. The sheer size of defendants' pleadings required extensive time for analysis. Defendants cited approximately 102 different authorities, all of which had to be read and analysed. Extensive time was required just to digest the defendants' pleadings.

7. Thereafter, it was necessary for the undersigned counsel to engage in extensive fundamental research in order to prepare his brief in response to defendants' motion. The completed brief contains 19 separate issues, many of them containing sub-issues. Numerous authorities are cited. The total length of the brief is 141 pages. Plaintiffs have attempted to be thorough and exhaustive and to brief all of the law applying to all aspects of the case. The time consumed was extensive. The undersigned counsel has done his utmost to comply with the time deadlines fixed by the Court, but it was physically impossible to do so. In hindsight, he realizes that he could (and possibly should) have done a less thorough job and stay within the time limits fixed by the Court, but it was physically impossible to do as thorough a job in any less amount of time.

8. It is submitted that defendants have been put to no imposition and that the granting of this motion will not

unreasonably delay the disposition of the case.

[Here omitting balance of affidavit.]

[947-9A]

[PAGES 950-952, JOINT APPENDIX, 2d CIRCUIT, BEING PARTS OF AFFIDAVIT OF HOWARD D. PATTISON DATED MARCH 16, 1980]

[Same district court, case name and numbering as before]

* * *

Plaintiffs have variously presented in their brief and supplemental brief opposing summary judgment that discovery is needed in order to fully oppose certain of defendants' summary judgment claims. In their reply brief, defendants strongly argue that plaintiffs should not be granted additional time for discovery.

5. It is submitted that the very nature of the case, as pleaded in the complaint, reflects that practically all relevant information lies within the control of defendants. Neither plaintiff Howell nor other members of the plaintiff class would, in any likelihood be qualified to testify as to the manner in which the business operations of the corporate defendant, MAI have been conducted. Therefore, the motion for summary judgment is the type of motion which cannot be successfully opposed by affidavits.

6. This affiant affirmatively states that he knows of no person qualified to testify upon trial as to any of the material facts alleged in the complaint; which person would be willing to voluntarily make affidavit in support of plaintiffs' cause of action. Plaintiff Howell's deposition and

plaintiffs' supplemental brief fully set forth the factors upon which the complaint was based, to-wit: defendants' documents, circumstantial evidence and numerous non-evidentiary factors, primarily constituting those matters which plaintiff Howell and the undersigned attorney believed in good faith that they could develop through investigation and discovery prior to the time of trial.

7. In order to oppose the motion for summary judgment, it will be necessary for plaintiffs to take the deposition of the named individual defendants, several corporate officers and managerial employees of MAI, certain persons who were at the time of filing of suit officers and managerial employees of defendant Genesis One Computer Corp., certain persons who were at the time of filing suit, officers and managerial employees of Genesis One Products Corp., and other persons affiliated and identified with defendants.

8. In addition, it will be necessary to obtain discovery of numerous of defendants' records. Considerable time will be required for the analysis thereof. Plaintiffs will in all likelihood need to retain experts to assist in the examination and evaluation of some of the information discovered.

[Balance of affidavit omitted.]

[950-2A]

[EXCERPT FROM PLAINTIFFS' MEMORANDUM IN SUPPORT OF CROSS-MOTION TO DEFER SUMMARY JUDGMENT PROCEEDINGS PENDING DISCOVERY]

[Same district court, case name and numbering as before; Filed March 25, 1980]

It is contended that plaintiffs have not adequately outlined the modes or the objectives of their discovery. We

believe that this has been done very substantially in the original brief and extensively done in the supplemental brief. However, plaintiffs will recapitulate:

(1) Under their first issue, plaintiffs have submitted that defendants have omitted to disclose the "real purpose" behind the redemption of the "C" shares: to expand the company's line of business without allowing the "C" shares to participate therein. Several items of circumstantial evidence are pointed out (Pf.Sp.B. 13-20). Plaintiffs need access to defendants' plans and projections for new ventures. Plaintiffs need access to defendants' plans for the financing thereof. Plaintiffs will need the depositions of defendants' principal officers and financial executives and the persons responsible for the planning and implementation of the Wordstream program.

(2) Plaintiffs submit that MAI management has, since 1974, acted to depress the market price of "C" shares in anticipation of a freeze-out move (Pf.Sp.B. 13, 46). When the redemption proposal was finally presented, the Chairman in his "fairness" discussion relied primarily upon the fact that "C" shareholders were receiving a "27% premium over market price." Plaintiffs need discovery of the reports and information distributed to "C" shareholders and circulated in the investment community specifically relating to "C" shares for comparison with similar information circulated with respect to common shares. Depositions of those company officers charged with shareholder and with public relations will be needed along with their records.

(3) The August 5 letter disclosed for the first time that $17 million out of $22 million of Genesis Computer assets were tied up in "due from affiliated companies" (Pf.

Sp.B. 14, 46). It is necessary to discover the complete balance sheets of Genesis Computer for a five year period including a complete itemization of this item to determine how it arose. The operating statements of Genesis Computer for the same period must be discovered to obtain what compensation Genesis Computer received in this connection. The depositions of those responsible for this unseemly diversion of assets must be taken in order to determine whether they made fair and reasonable provisions for the protection of "C" shareholders in farming out the assets of Genesis Computer to other subsidiaries.

(4) Plaintiffs have urged that defendants are in the process of spending $15 million to enter the Wordstream business (Pf.Sp.B. 16-17, 46). Defendants have evasively responded, both in the August 5 letter and in this Court that no such expenditures have affected cash flow payable to "C" shareholders. Contrariwise, we present that plaintiffs were entitled to know in voting their proxies that defendants were in the process of spending almost $20 per "C" share on projects upon which plaintiff "C" shares had first call on the profits. Discovery is needed of the expenditures made, committed and budgeted by the parent and all subsidiaries in this respect.

(5) At the time the redemption proxy went out, the rights of "C" shareholders were subject to the rights of the holders of overhanging debt, which was sopping up the majority of otherwise available cash flow income (Pl.Sp.B. 47). Plaintiffs are unable to reconcile the 1976 and 1977 distributions to "C" shareholders with the amounts of cash flow paid on overhanging debt as reflected by MAI's published reports. Plaintiffs need discovery of the complete terms and provisions of the overhanging debt plus all cash

flow statements, comments and correspondence passing between MAI and the holders of the overhanging debt.

(6) The overhanging debt reached pay-out status in September, 1979 instead of "not later than July 10, 1980" as stated in the proxy material; thereby understating the availability of cash flow to the "C" shareholders by a total of $1.97 per share (Pl.Sp.B. 50). Plaintiffs need discovery of the cash flow projections on which defendants based their "not later than July 10, 1980" statement, and may need further historical discovery to determine the bona fides of this misprojection of pay-out date.

(7) Reading between the lines of the proxy material, it appears that Genesis Computer was forced to absorb all of the competitive price reductions necessary to market the G-Series terminals and that the manufacturing subsidiary retained its profit margins intact (Pl.Sp.B. 51-52). Discovery of the propriety of this matter is imperative. The complete financial statements of the manufacturing subsidiary must be obtained and the depositions of those responsible for inter-subsidiary pricing are needed.

(8) The August 5 letter indicates that the manufacturing subsidiary was obtaining a disproportionate share of the operating profits being generated by the new Wordstream equipment (Pl.Sp.B. 52-54). Discovery of the same sources is necessary in order to check into the propriety of this practice.

(9) The financial statements of Genesis Computer were entirely withheld from view until August 5, 1978 and the statements produced were only fragmentary and uncertified. Plaintiffs' allegation that reasonably detailed financial statements in certified forms were readily avail-

able at modest expense from independent accountants' work papers has been ignored throughout (Pl.Sp.B. 113-115, 124-127). Depositions of the auditors and discovery of their work papers are necessary to support this allegation.

(10) Plaintiffs further need the three items of discovery mentioned by defendants (Df.Rp.B. 13-14). We will respond to the argument of irrelevancy in our response to defendants' Reply Point III below.

The foregoing list is not exhaustive. It is merely illustrative of the fact that discovery in the case is necessary and that plaintffs should have an opportunity to obtain discovery.

[R. 58/8-11]

[PAGES 962-963, JOINT APPENDIX, 2d CIRCUIT, BEING PARTS OF AFFIDAVIT OF HOWARD D. PATTISON DATED MARCH 25, 1980]

[Same district court, case name and numbering as before]

* * *

A brief entitled "Plaintiffs' Response to Defendants' Reply Brief In Support of Defendants' Motion For Summary Judgment" and also entitled "Plaintiffs' Memorandum In Support of Cross-Motion to Defer Summary Judgment Proceedings Pending Discovery" was filed on March 24, 1980. On pages 8-11 of such brief, plaintiffs have outlined the matters as to which they seek discovery, the form of discovery desired and the nature of the information which the plaintiffs seek by discovery.

4. Co-counsel has suggested that such a statement should be in the form of an affidavit rather than merely

stated in a brief, and for such purpose, plaintiffs hereby submit the within supplemental affidavit.

Affiant states that he has read pages 8, 9, 10 & 11 of plaintiffs' aforesaid Brief In Response, Etc. All statements of fact therein contained are true and correct to the best of affiant's knowledge. Affiant believes that discovery as there outlined is necessary to the presentation of plaintiffs' cause of action and to further oppose the motion for summary judgment, all for reasons therein stated. Plaintiffs' desire to obtain discovery is not for the purpose of delay nor for the purpose of putting defendants to expense, imposition or embarrassment. Affiant believes and has reason to believe that the desired discovery procedures will establish and prove plaintiffs' cause of action.

[Formal closing parts omitted.]

[962-3A]

[PAGES 313-314, JOINT APPENDIX, 2d CIRCUIT, BEING PORTION OF SUMMARY JUDGMENT AFFIDAVIT OF ROBERT W. BEREND, GENERAL COUNSEL, MANAGEMENT ASSISTANCE, INC. DATED DEC. 10, 1979]

[Same district court, case name and numbering as before]

11. Alleged Failure to Disclose Efforts to Make, and Alleged Fraud in Failing to Make, a Secondary Securities Offering. (Complaint ¶¶ 37, 38)

Referring to the provision in MAI's Certificate of Incorporation under which C shareholders would be entitled to receive 50% of the proceeds from a securities offering by any MAI domestic subsidiary (after certain debt obliga-

tions had been paid), the complaint alleged that the Proxy Statement is defective in failing "to disclose what efforts defendants have engaged in to make any securities offering up to this date" (Complaint ¶ 37).

The simple answer, as set forth in the Supplementary Proxy Statement, demonstrates the lack of materiality of this omission: "The Company is not required to make, nor has it made any representation that it would make, any efforts in this connection, and has no present plans to effect any such offering. Management does not believe that any such offering is in the Company's interest" (p. 7).[31]

Plaintiff also alleged that the 1974 MAI Registration Statement, covering the initial issuance of the C Stock, was fraudulent in making "an illusory promise" to have one of its domestic subsidiaries make a securities offering, in the proceeds of which the C shareholders would be entitled to participate. Plaintiff concludes that the promise was illusory because defendants have made no efforts to effect such a securities offering (Tr. 343). Aside from the questionable logic inherent in that reasoning, plaintiff's claim is totally devoid of any factual support that such promise was ever made, and he admitted that he had "no personal basis for making it [the allegation]" (Tr. 53). The reason for that void is that the language itself makes clear that no promise was made or intended. The 1974 prospectus and proxy statement merely stated that "if Management has a secondary offering of equity securities or subordinated indebtedness of a domestic subsidiary, 50% of the

[31]In addition, unless and until certain outstanding indebtedness was repaid in full — not scheduled until July 1980 — no dividends were payable out of the proceeds of any secondary offering. This indebtedness was in fact paid in full in September 1979. See p. 34 n. 25 supra.

net proceeds therefrom will be set aside for payment of a dividend on the ensuing December 15" (Exhibit D hereto at p. 11; Exhibit E hereto at p. 11) (emphasis added).[32] The 1974 prospectus (p. 12) and proxy statement (p. 12) further advised that "there should be no implication that whether through Cash Flow From Operations of [GOCC], *secondary securities proceeds* or otherwise, any amount of dividends other than a nominal amount may be paid with respect to the Series C Preferred Stock" (emphasis added).

In any event, assuming *arguendo* that defendants had promised in the 1974 offering materials to make the secondary offering (which they did not), plaintiff conceded that he did not rely on this alleged promise. Indeed, he admitted at his deposition that he did not recall reading the portion of the 1974 materials relating to such secondary offering and that the "promise," which he now perceives in the materials, therefore did not induce him to vote "yes" with respect to the 1974 offering proposal (Tr. 343-48).

[313-4A]

[32]Plaintiff conceded that this language meant that "it (a secondary offering) may or may not be done" (Tr. 338) and that this was the only provision in the 1974 prospectus which plaintiff claims constituted a promise to make efforts to obtain a secondary offering (Tr. 343).

[PAGE 475, JOINT APPENDIX, 2d CIRCUIT, BEING PORTION OF MANAGEMENT ASSISTANCE, INC. PROXY STATEMENT DATED JULY 9, 1974 AND FURTHER BEING EXHIBIT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT]

[Same district court, case name and numbering as before]

* * * flow. [Under the BCL, Management must, however, have surplus to effect the redemption or make the other payments and must not be rendered insolvent by any such payment.] Reference is made to Exhibit C for a table showing the effect of the rescheduling.

In order to reduce its sinking fund obligations on the Outstanding Preferred Stock, Management could seek to purchase from the holders thereof shares of Series B Preferred Stock at prices less than $50 per share and then apply such shares so acquired against its redemption obligation. In April 1974, Management purchased 2,000 such shares at $2 5/8 per share. As a result of limitations in the Financing Agreement and the projected cash requirements of MAI, the Board of Directors does not, at the current time, believe this method will achieve the same overall favorable effect which the proposed Amendment to the Certificate of Incorporation (if approved and filed) will effectuate. Purchases of Series A Preferred Stock are currently prohibited under the Financing Agreement and the Note Agreements (except in limited amounts to meet required sinking fund provisions) and absolutely prohibited (without consent) under the indentures relating to outstanding subordinate debentures of Management.

If approval is not given to the proposed Amendment to the Certificate of Incorporation, then, as indicated above,

Management may go into default. If Management defaults in its payment of indebtedness under the Financing Agreement and the Note Agreements (which indebtedness aggregated $17,879,619 as of June 18, 1974), the holders of the various classes of the senior and subordinated debt can accelerate all indebtedness for borrowed money of Management, which indebtedness also includes outstanding subordinated debentures (which aggregated $7,762,000 as of June 18, 1974). In such event, Management would be unable to pay such indebtedness and the Board of Directors will have to consider alternative courses of action, including the filing of a petition in bankruptcy under the Federal bankruptcy laws. It is the opinion of the Board that if a petition were filed or if creditors otherwise sought to enforce their rights, the shareholders of Management would not recover anything on their investment.

In summation, since September 30, 1968, MAI has reduced its senior secured indebtedness (including the obligation under the Financing Agreement) from $97,874,080 to $14,047,093 as of June 18, 1974. During the same period, MAI reduced its obligation with respect to the Senior Subordinated Notes from $8,400,000 to $5,009,690. Funds to effect this reduction in debt came primarily from revenues of Genesis One derived from unit record and other technologically obsolete equipment. However, for the fiscal years 1969 through 1973, MAI's aggregate loss was $57, 008,-580. In addition to the debt reduction, and despite the losses, since 1971, Management has implemented its basic/four program and expanded its domestic maintenance services so as to offset the declining rental revenues from its older equipment. As indicated in the STATEMENTS OF CONSOLIDATED OPERATIONS, MAI's revenues during fiscal years 1972

and 1973 and, as indicated on page 19, during the eight months ended May 31, 1974 increased after declining in each of the three prior fiscal years. During the eight months ended May 31, 1974, net income amounted to $1,225,753, of which $133,713 is attributed to operations and $1,092,040 is attributed to waivers of interest by lenders. In the opinion of Management's Board of Directors, MAI has reached a critical point in its efforts to maintain profitability and restore financial viability. While there is no assurance that MAI will attain these objectives, the Board of Directors of Management is of the opinion that approval and filing of the proposed Amendment to the Certificate of Incorporation, with the concurrent effectiveness of rescheduling of maturities and other changes contemplated by the Bank Amendment and the Purchase Amendment, and consummation of the Exchange Offer will alleviate the burden of major obligations and permit MAI to continue to develop its operations in a manner more likely to be beneficial to shareholders and creditors.

[475A]

[PAGES 316-319, JOINT APPENDIX, 2d CIRCUIT, BEING RESPECTIVELY, PORTIONS OF SUMMARY JUDGMENT AFFIDAVITS OF ROBERT W. BEREND, GENERAL COUNSEL, AND GERALD WALPIN, TRIAL COUNSEL, MANAGEMENT ASSISTANCE, INC., BOTH DATED DEC. 10, 1979]

[Same district court, case name and numbering as before]

* * * have disenfranchised all C shareholders who also owned common shares in at least the above ratio.

However, this would not only have been impossible to implement, but it would also have required defendants to violate State law.

As a practical matter, defendants could not possibly have determined the identities of all of the common shareholders and C shareholders, because many of these shares were held and voted in street name. Thus, it would have been impossible to determine which of the C shareholders owned the requisite number of common shares which, under plaintiff's theory, would have prevented them from voting their C Stock.

On an even more fundamental level, however, any disenfranchisement of C shareholders would have violated section 612(a) of the New York Business Corporation Law, which requires that "*Every shareholder* of record *shall be entitled* at every meeting of shareholders *to one vote for every share standing in his name* on the record of shareholders, unless otherwise provided in the Certificate of Incorporation" (emphasis added). Because the Certificate of Incorporation of MAI does not (and did not) contain any provision, relevant here, which would limit the force and effect of section 612(a), defendants would have violated State law if they had deprived any C shareholders of the right to vote on the redemption proposal.

14. Miscellaneous Other Fraud Charges
(Complaint ¶¶ 44, 45, 46, 47)

Plaintiff concluded his complaint with various miscellaneous allegations of fraud relevant to the operation of MAI which, plaintiff alleged, have damaged each C shareholder [but which he conceded were not contrary to the interests of MAI's common shareholders (Tr. 58-59)].

These miscellaneous allegations are conclusory in nature and were admittedly made without any factual support. Thus, plaintiff conceded at his deposition that he had no knowledge or information as to the basis of his accusations concerning the misconduct alleged in paragraph 47 of the complaint, and that most of the other fraud allegations in paragraphs 45-47 of the complaint were all "matter[s] of inference and deduction" (Tr. 55-57). In any event, none of these allegations has any relevance to the issue in this case — the sufficiency of MAI's proxy materials.

Moreover, contrary to plaintiff's conclusory allegations, all decisions relevant to the expenditure of GOCC funds reflect an exercise of proper business judgment. All such decisions were made with a meticulous regard for the rights of each class of MAI shareholders. For example, the allocation of parent company charges was (and is) identical for all MAI domestic subsidiaries, including GOCC, and was (and is) made in proportion to the revenue contribution of each subsidiary — a commonly used method of allocating parent company expenses among subsidiaries. (See also page 7 of the Supplementary Proxy Statement for a statement of the manner in which relevant intercompany transactions are charged.)

Perhaps the most compelling evidence that MAI fairly treated C shareholders in the computation of Cash Flow From Operations is the following: MAI, on a quarterly basis, was required to furnish to all participants in the multi-million dollar financing agreement and to all noteholders (see Proxy Statement p. 48) a detailed calculation of Cash Flow From Operations for the preceding quarter. The recipients of this computation were approximately 40 institutions (including banks) whose rights to expedited

payment of the debt to them depends on that computation. These institutions have never voiced any objection to the correctness of the computation.

There is thus no factual merit to these miscellaneous allegations made by plaintiff.

[Here omitting formal closing parts, Berend affidavit and formal opening parts, Walpin affidavit.]

I am a member of the firm of Rosenman Colin Freund Lewis & Cohen, attorneys for defendants herein. I make this affidavit in support of defendants' motion for an order, (a) pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint and granting defendants summary judgment, and (b) pursuant to the equitable powers of the Court and Rule 11, F.R.C.P., granting defendants their attorneys' fees and other litigation expenses.

The facts demonstrating that there is no merit to plaintiff's complaint are set forth in the accompanying affidavit of Robert W. Berend ("Berend Affdavit"), and will not be repeated in detail herein.

I limit my affidavit to those facts which warrant imposing on plaintiff and/or his counsel the cost of defendants' * * *

[316-9A]

[EXCERPT FROM DISTRICT CLERK'S RECORD, ITEM 52, BEING PLAINTIFFS' COMBINED SUBSTITUTE AND SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT]

[Same district court, case name and numbering as before; filed Mar. 7, 1980]

The *Parklane* case reinforces the considerations expressed by the commentators. Admittedly, much discovery remains to be done. However, plaintiffs charge that defendants have omitted to disclose the real purpose behind the redemption of the "C" shares: to expand the company's line of business without allowing the "C" shares to fully participate therein. The success with the Basic Four minicomputer has refueled the corporate treasury. It has restored the company to investment stature so that it can now raise capital for purposes of expansion. It has stirred the ambition and the imagination of corporate management. However, that management did not want to share the company's new-found prosperity. Management did not want to spend large amounts for the development of Wordstream (and probably other projects into which they desire to expand) and share the profits from such operations with the "C" shareholders. Hence, the freeze-out.

Full discovery is yet to be had, but there are already straws in the wind:

Item (1): The complaint (¶44) charges that from inception, defendants have deliberately omitted to provide "C" shareholders or the public with any but the most scant information regarding the operations of Genesis Computer or of the amounts which have accrued or may accrue upon the "C" shares. It is alleged that such conduct has depressed

the market for "C" shares. The allegation was ignored in the August 5 attempted proxy supplement and ignored again in the Berend affidavit. (See pp. 49-51 thereof). For summary judgment purposes, the allegation is admitted. It appears that plotting against the "C" shares is not of recent origin. Defendants' sense of fiduciary responsibility; their feelings of corporate accountability toward the "C" shares has always been low.

Item (2): No financial statements of Genesis One ever saw the light of day until the filing of this suit and defendants' belated ex parte effort to supplement their solicitation. A "condensed unaudited balance sheet" reflects that almost $17 million of Genesis One's total assets of $22 million was tied up in an item entitled "Due from affiliated companies."[8]

No explanation of any kind has ever been offered for this unseeming diversion of assets. Genesis One was neither a banking corporation nor an investment corporation. It was a business corporation and had need of its own assets to conduct and expand its own business for the benefit of "C" shareholders. It appears that defendants had a long standing purpose of manipulating corporate operations so as to minimize the obligation to "C" shareholders. Plaintiffs suggest that the June 27, 1978 proxy solicitation was designed to finish off the job.

Item (3): The "supplemental" solicitation also contains an "unaudited summary of operations." Under the heading "miscellaneous", we find 1975 revenue of $354 thousand and 1976 of $1.9 million. The shareholders who received

---

[8]The total assets were somewhat understated because all of the leased equipment then providing revenue close to $10 million per year had been completely depreciated off the books.

this supplement were forced to speculate whether or not "miscellaneous" was, wholly or partially, compensation returned by "affiliated companies" for the use of Genesis One's $17 million. We do note that the "miscellaneous" item was down to zero for the year 1977, but the $17 million dollars was still due and owing. This matter is further pointed out as possible evidence of a long standing purpose not to deal fair and square with "C" shareholders.

Item (4): In accordance with SEC regulations requiring the insertion of such a topic, the original solicitation (pp. 4-7) contains three and one-half pages of "Reasons for Proposed Redemption." However the reasons are all verbiage and no substance. Defendants failed to articulate one good hard reason for the redemption.

Item (5): Among the said "reasons" defendants stated that the segregation of Genesis One business creates extra expense and causes operating inefficiency. Such factors were fully known at the time that the terms of the "C" shares were originally negotiated. Even further, it is stated that until senior debt is paid off, the segregation must continue.

Item (6): Under the said "reasons", defendants stated that for violation of the Exchange's "one share-one vote" rule, the common shares could not be listed on the New York Stock Exchange as long as the "C" shares remained outstanding. A less drastic remedy than redemption would have been to allow full voting rights to the "C" shares (which the common shares would still have out-voted, nine to one). Even further, any intent to list the company's shares was expressly denied. [8a]

[8a] On November 1, 1979, MAI common shares began trading on the New York Stock Exchange.

Item (7): One of the said reasons states that redemption "may also facilitate the company's ability to obtain financing," but no intent to seek financing was indicated. Especially bearing in mind that certain financing proceeds had to be shared 50-50 with the "C" shareholders, we must assume that defendants had no intent to seek significant financing; else they are guilty of material non-disclosure.

Item (8): The original proxy statement mentions that in order to manufacture Wordstream products, another subsidiary of MAI was "currently negotiating" for "substantial additional plant facilities." Thereafter, plaintiffs charged in their complaint that defendants had spent at least $5 million entering into the Wordstream business and that defendants had "fixed plans and commitments to spend at least an additional $10 million" (¶ 35).

In the face of this rather specific allegation, defendants went no further in their attempted supplement of August 5 than to say:

> "The Company and its other subsidiaries, * * * expended substantial sums for developing new business * * *, but such expenditures do not affect * * * [Genesis One's] 'Cash Flow From Operations' * * *, and thus do not reduce the amount of dividends paid on the Series C Preferred Stock."

The $5 million and $10 million allegations were avoided rather than answered in the "supplement." Neither do we find anything in their summary judgment affidavits or exhibits to refute the $5 million dollar and $10 million dollar allegations, and for summary judgment purposes, they are admitted.

The fact that Genesis One did not spend the money is immaterial. The "C" shareholders were entitled to know in terms of dollars the size of the expenditures and commitments which MAI and all of its subsidiaries had committed to make in the development of the Wordstream products so that plaintiff "C" shareholders would be in a position to evaluate possible future cash flow income from this source. The deliberate hiding of this vital information is submitted as indicative of a hidden purpose for the redemption.

Item (9): The terms and conditions of the "C" shares were most generous from the standpoint that defendants had no obligation to pay interest, carrying charges or dividends (using the term in its ordinary sense) upon the "C" shares. All that they had to do was return the original $50.00 investment by September 30, 1984. Further, any unearned portion up to $40.00 would be cancelled.

The original solicitation (p. 9) reveals that the entire cost of redeeming the "C" shares was financed by a bank loan, the terms of which were far less generous.[9] Any notion that MAI in proposing this redemption was seeking an outlet for its surplus cash is thus dispelled.

On June 27, 1978, MAI was a very profitable company, but it was also a company that had run up an operating loss during six or seven of its previous ten years. During such period it had also gone through two re-organizations and each of those times, the bankers had to make substantial

---

[9]We calculate that MAI contracted to pay a maximum of $3,658,403 to borrow money to pay off this non-interest bearing obligation. Also, as part of the price of their consent, MAI's bankers increased the interest rate on senior debt by 1% charged a commitment fee, demanded compensating balances and put restrictions on future indebtedness.

concessions, including the waiver of interest, in order to keep the company alive. Knowing the habits of bankers and the length of their memories, we daresay that on June 27, 1978, MAI was not possessed of unlimited lines of credit.

What was the real purpose that sent MAI to the bank, to burden its limited line of credit for the sum of $9 million in replacement for a non-interest bearing obligation due several years hence? The "Reasons for Proposed Redemption" as stated in the solicitation do not suggest any valid business purpose for contracting such heavy obligations, which in turn suggests that the true purpose was hidden.

Item (10): We also note that defendants were in somewhat of a hurry to freeze-out the plaintiff class. They called a special meeting of shareholders to occur on August 10, 1978, within six months of the scheduled date for a regular meeting of shareholders. Additional legal, accounting and solicitation expense was incurred. Why? Because, every day that the redemption was delayed exposed them to the risk that the true purpose of the redemption would become known. As soon as the magnitude of the company's plans to market Wordstream became generally known in the marketplace, as soon as cash flow earnings began to rise, the market price of "C" shares would also commence to rise and the true purpose of the redemption would be frustrated. The reason for calling a special meeting of shareholders was to make sure that the *coup de grace* was administered before the true purpose came into view.

Item (11): Many firms purchase their own stock in the open market from time to time and the practice, in moderation at least, has never been criticized. Also, there have been many instances of companies which felt that

their own stock was the best investment of which they were aware for their surplus funds. In such instances, companies have invited voluntary tenders of stock for cash. Again, so long as such tender offer does not threaten to deprive an active market for stock still outstanding, there has been little criticism of the practice.

Obviously, defendants could have followed either route with respect to the "C" shares with their surplus funds (none of which were available). They could have made open market purchases, and judging from prices then prevailing (which they had caused or contributed to depress), they could have obtained a substantial number of shares at or below $10.50. If defendants had made a voluntary tender offer on June 27, 1978, indications are that a substantial portion of the "C" shares would have been tendered.

The non-coercive routes were open and available. In line with present day notions of corporate fiduciary responsibility, defendants should have, at least, studied, if not attempted to take up the "C" shares on a voluntary basis. Defendants did not do so. Instead, they took the freeze-out route.

Why the freeze-out route? Plaintiffs again submit that a voluntary redemption would not have freed defendant from the two restrictions here mentioned. It is again submitted that the real reason of the freeze-out was to free the company from provisions freely negotiated which saved the company from collapse and which defendants (prosperity having bloomed again) came to consider as burdensome.

SUMMARY: The purposes as stated were a mere screen for the true purpose of this redemption. Plaintiffs say that the real purpose of this "no-purpose" redemption was to free the company from the 50-50 restriction and to avoid the necessity of sharing the profits from new ventures with the "C" shareholders. Until defendants show otherwise, they have not met the burden of demonstrating that there is no genuine issue as to any material fact and they may have no summary judgment.

[R. 52/13-20]